Supreme Court, U. S.
FILED
AUG 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RUTH RAISEN,

Petitioner,

v.

PHILIP RAISEN and INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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The real question posed by the petitioner is whether Florida is forbidden by the Equal Protection or Due Process Clauses of the Fourteenth Amendment from retaining, as a matter of public policy, the common law doctrine of interspousal tort immunity.[1] That question is simply not a substantial federal constitutional question. Certiorari should therefore be denied.

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[1]Petitioner erroneously cites the Due Process Clause of the Fifth Amendment, which applies only to federal action, as a basis for the claim that Florida's doctrine of interspousal immunity denies married couples access to state courts. The reference should be to the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

The respondents have no quarrel with the fact that petitioner did attempt to raise this federal constitutional question at each stage of the proceedings below. And they have no significant difference with petitioner's "Statement of the Case & Fact."[2] They accordingly premise this brief in opposition on the claim that the federal constitutional issue, as raised by petitioner, is not substantial and not worthy of review by this Court.

1. One profound manifestation of the lack of substantiality is the fact that none of the opinions rendered in the Florida courts, not even the dissenting opinion in the Florida Supreme Court (*see* Pet. App. A-13 to A-21), made any mention of petitioner's constitutional claim. Such total silence by the Florida judiciary is eloquent testimony to the fact that, in implicitly considering and rejecting this claim, the courts below deemed the claim to border on the frivolous.

2. The adoption or rejection by a State of the interspousal tort immunity doctrine finds constitutional footing in the police powers of the States to regulate matters of marriage and domestic relations. Those are "concerns traditionally reserved to the states," *Trammel* v.

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[2]Respondents hasten to add, however, that the allegations in petitioner's complaint that her lawsuit was not fraudulent and would not imperil domestic harmony, and that the application of interspousal tort immunity would deprive her of due process and equal protection of the laws, were not well-pleaded under Florida rules of practice and were not admitted by respondents' motion to dismiss. Fla. R.Civ. P.1.110(b); *Welch* v. *Moothart*, 89 So.2d 485 (Fla. 1956); *Lytell* v. *McGahey Chrysler-Plymouth, Inc.*, (Fla. 3d DCA 1965); *Wilson National Life Insurance Co.* v. *Glaaser*, 136 So.2d 651 (Fla. 3d DCA 1962).

United States, 100 S.Ct. 906, 912 (1980), concerns that fall within "an area that has long been regarded as a virtually exclusive province of the States," *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1975). And matters that fall within that area of "virtually exclusive" state concern are largely governed by legislative determinations of public policy. As this Court said in *Thompson* v. *Thompson,* 218 U.S. 611, 618 (1910), with respect to opening local courts to tort suits between husband and wife,

> Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial branch of the government. In cases like the present, interpretation of the law is the only function of the courts.

3. In holding that "the common law doctrine of interspousal tort immunity is still viable in Florida," Pet. App. A-13, the Florida Supreme Court was applying the *Thompson* v. *Thompson* principle that changes in the common law doctrine of interspousal tort immunity "should be changed through legislative enactment and not by judicial decision," Pet. App. A-9. And because the arguments pro and con respecting that doctrine are so largely matters of legislative or public policy, the petitioner is reduced to the complaint (Petition 8) that the interspousal tort immunity doctrine fails to accomplish its various policy goals "and is therefore unconstitutional." In other words, petitioner disagrees with the policy that is embedded in the Florida common law with the approval of the Florida legislature. Such disagreement can hardly rise to the level of a substantial federal constitutional

claim. Nor can that disagreement serve to alter the role of this Court, which traditionally refuses to judge the wisdom of state legislative policies. *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106 (1949).

4. With respect to petitioner's equal protection claim, it need only be said no serious challenge can be made to an interspousal classification of people "by their marital status" when dealing with matters relating to marriage and domestic relations. That is certainly not a suspect classification, and does not even pretend to discriminate as between husbands and wives. It is enough if there is a reasonable relationship between the goal of promoting matrimonial harmony and achieving that goal by means of imposing interspousal tort immunity.

The leading authority supporting such a classification is *Paiewonsky* v. *Paiewonsky,* 446 F.2d 178, 181-182 (3rd Cir. 1971), wherein this Court denied certiorari, 405 U.S. 919 (1972). The Third Circuit could find no violation of equal protection in the alleged discrimination against women resulting from the doctrine of interspousal tort immunity. The court said that it had not been convinced that "the immunity doctrine lacks substantial vitality" and that "it follows that it has a reasonable relationship to the [promotion of domestic tranquility] interest sought to be furthered by it." To the same effect, *see Alfree* v. *Alfree,* 410 A.2d 161, 163 (Del. 1979); *Jones* v. *Sweet,* 244 Ga. 715, 261 S.E.2d 610 (1979); *Brawner* v. *Brawner,* 327 S.W.2d 808, 815 (Mo. 1959); *Tyrken* v. *Tyrken,* 63 Ill. App. 3d 199, 379 N.E.2d 888 (1978); *Vogel* v. *Robison,* 80 Ill. App. 3d 312, 399 N.E.2d 688 (1980).

Other courts, in rejecting such equal protection claims, have noted that this interspousal tort doctrine applies to husbands as well as wives and thus establishes no in-

vidious sex discrimination. *See Locklair* v. *Locklair,* 256 F.Supp. 530 (D.S.C. 1960); *Smith* v. *Smith,* 240 Pa.Super. 97, 361 A.2d 756, 757 (1976).

5. With respect to petitioner's due process claim that married couples are denied access to state courts by reason of the immunity doctrine, the unsubstantiality of the claim is equally evident. Courts that have dealt with that kind of claim have uniformly ruled that a spouse does not have a property interest in a cause of action when it is not recognized at common law. And even if such a property interest in a suit were to be recognized, the courts hold that such a property interest is lawfully restricted in a matter of public concern by virtue of the State's police power. *See Heckendorn* v. *First National Bank,* 19 Ill.2d 190, 166 N.E.2d 571, 574 (1960); *Brawner* v. *Brawner, supra,* 327 S.W.2d at 814-815; *Smith* v. *Smith, supra,* 361 A.2d at 757.[3]

In sum, petitioner has failed to present a substantial federal constitutional question.

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[3]There appears to be one federal district court case stating somewhat indiscriminately, that the Florida interspousal immunity doctrine is superseded by the Fourteenth Amendment. *Alexander* v. *Alexander,* 140 F.Supp. 925, 928 (D.S.C. 1956). But that decision has been expressly repudiated by a later decision in the same court, *Locklair* v. *Locklair,* 256 F.Supp. 530, 532-533 (D.S.C. 1966), which noted that the *Alexander* sentiments were at best *obiter dicta.* The *Alexander* decision, which was a *lex loci delicti* interpretation of Florida law, has been disapproved by the Florida courts. *Bencomo* v. *Bencomo,* 200 So.2d 171, 174 (1967); *Gaston* v. *Pittman,* 285 F.Supp. 645, 646 (N.D.Fla. 1968).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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